

# Rookie Year on the Federal Bench

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*A lawyer's transition from bar to bench is typically a trying experience. The author, a judge on the United States Court of Appeals for the Sixth Circuit, recounts his first year on the federal bench. He discusses his appointment, his experiences during his first sitting as a Circuit Judge, and his development of a normal routine of case management. This essay also discusses some of the other aspects of judging, such as hiring law clerks and getting along with colleagues. The author concludes by affirming his desire to continue as a part of the judicial system for many years to come.*

## I. INTRODUCTION

My rookie year on the federal bench was from November 21, 1997 through November 20, 1998. The bench in question is the United States Court of Appeals for the Sixth Circuit, based in Cincinnati, Ohio. After thirty years in private practice with a Memphis law firm, eighteen years as an adjunct professor of trial advocacy at the University of Memphis School of Law, and two years as a bar president (first with the Memphis Bar Association and later with the Tennessee Bar Association), I was ready for a new challenge. Little did I know that the challenge would require endless patience on the back side of the starting gate, yet necessitate booster-rocket acceleration at the bang of the opening gavel. The ride on the first lap around the track has been exhilarating and perhaps worth recording for the benefit of future judicial jockeys, potential law clerks, and interested spectators.

## II. GETTING THERE

How one becomes a federal judge has always been surrounded by an aura of mystery, largely because everyone's path to appointment is unique. The people who fill the 839 positions currently authorized by Congress for lifetime service as an "Article III judge" are all licensed attorneys. Beyond that, the permutations in legal experience, political connections, personality, and demographics are as varied as multiple views through a kaleidoscope. The only thing that can be said for certain is that, regardless of personal merit, one has to have the good fortune of being in the right place at the right time for the metamorphosis from bar to bench to materialize.

In my case I was blessed with two senior partners who had strong Democratic Party connections and were willing to recommend me to Vice President Al Gore. Because Gore is the senior ranking Democrat from Tennessee, and both of the State's United States Senators are Republicans, the filling of Tennessee's three allocated slots on the Sixth Circuit Court of Appeals essentially hinges on the Vice

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President's recommendation to the President. The fact that a Tennessee slot opened up in 1996, that a nominee from heavily Democratic West Tennessee was politically desirable because the other two slots were filled by residents of Nashville, and that all but one of the federal district court judges in West Tennessee were Republican appointees were all part of the "being in the right place at the right time" syndrome that made my appointment politically feasible. Even then, I would never have thought of seeking the appointment without a jump start from one of my lawyer-clients who was politically active and interested in having the position filled by a Memphian.

The journey began with a telephone call from my client on the evening of September 3, 1996, the day after Labor Day. Not only was I then unaware of the vacancy, but I would never have imagined that one could leap directly from private practice to the court of appeals. I later found out that only four of the thirteen active (meaning full-time, as opposed to senior status) judges then on the Sixth Circuit had previously served on the district court bench, and that four others of the thirteen had had no prior judicial experience at all. So with a background that included eight years as an unpaid part-time judge on Tennessee's disciplinary court for state judges, a reasonable amount of appellate experience in private practice, and several years of work as an arbitrator and mediator, I decided it was worth a try.

The passage of time between that telephone call on September 3, 1996 and my swearing in on November 21, 1997 seemed endless. Vice President Gore did not make his recommendation until May of 1997, President Clinton did not act on the recommendation until the middle of the summer, and my Senate Judiciary Committee hearing was not held until the end of September. The interim was filled with numerous letters of recommendation, lengthy questionnaires, a thorough FBI background check, and interminable waiting. When the full Senate finally approved my nomination on November 6, 1997 by vote of ninety-eight to one (there is always one contrarian(!) and one was absent), I was more than ready to start my new career.

### III. INVESTITURE

My swearing-in on Friday, November 21, 1997 took place in Memphis's spacious city hall council chambers. Technically, the ceremony is called an investiture, which sounds considerably more grand. Among those present were my two Nashville colleagues on the Sixth Circuit, the local district court judges, numerous members of the Memphis legal community, and several politicians, including Senator Fred Thompson (a Republican from Tennessee) and Representative Harold Ford, Jr. (a Democrat from Memphis). I distinctly recall both the loving words of my wife Betsy as I took the oath of office and I recall the ominous work load statistics mentioned by Circuit Judge Gilbert Merritt once I was committed "hook, line, and sinker." In the joy of the occasion, I put the scary statistics aside for the remainder of the day.

My first dose of reality came the following morning, when I was in my study at home reviewing various congratulatory letters and several federal employment forms. Betsy called out from the kitchen: “Ron, would you take out the trash?” Still feeling my oats, I replied: “Hey, I’m now a federal judge.” Without missing a beat, she said: “Okay, federal judge, would you *please* take out the trash?!” I did.

#### IV. MY FIRST SITTING

The next dose of reality hit me the following Monday, November 24, 1997 when I showed up bright and early at my temporary quarters in the Memphis Federal Building. My office suite for the next eight months was to be the vacant chambers of a district court judge who had moved to the other side of the building for a better view of the mighty Mississippi River. I found the *work space* quite adequate, but I realized that I was expected to immediately shoulder my share of the *work load* without the slightest clue of how to go about doing so.

Fortunately my trusted secretary from thirty years at the law firm decided to stick with me. As she began trying to understand the peculiarities of the federal courts’ computer system, I thought it would be a good idea to start reading the briefs and records of the first three cases on which I would sit. All three had been set for an en banc review, meaning that a majority of the entire fifteen-member court (now including myself and another new member, both added in 1997) had decided to vacate the decision of the three-judge panels that had earlier heard these cases.

Oral argument was set for December 10, 1997 in Cincinnati. This was only two weeks away, and my law clerks were not starting until December 1. My anxiety was somewhat relieved by the court’s Chief Judge graciously volunteering to send me his law clerks’ bench memoranda for each of the cases. These memoranda proved quite helpful in laying out the issues on appeal, factual background, and applicable law. I was particularly appreciative because two of the cases—one involving a prisoner’s civil rights complaint relating to alleged retaliation by prison officials and the other concerning the interpretation of a criminal statute prohibiting the use of a firearm in connection with a drug-trafficking offense—were completely foreign to my primary experience as a commercial litigator.

Just figuring out where to sit on an en banc court was a daunting experience. As the newest member of the court, I am known as the Baby Judge. At the other end of the spectrum is the Chief Judge, followed by the Prince of Wales (the next in line to become Chief Judge). Fortunately, the whole process is choreographed by an official from the clerk’s office. As the Baby Judge, I led the fifteen-member parade from the robing room to the bench. Betsy, who had come along to observe and to help me select colors and furnishings for my permanent chambers in Memphis, found the proceedings quite impressive. On the other hand, she was not pleased at having to stand when her husband entered the room! She declared later that she was never again going to attend the opening of court.

I thoroughly enjoyed my first sitting. As one who had appeared before the Sixth Circuit on a number of occasions as an advocate, I found that it is a lot easier to ask the questions than to answer them. My experience back in the robing room, however, was another matter altogether. En banc cases by their very nature tend to be difficult and contentious, with the original panel majority presumptively at odds with the majority of the full court who voted for the en banc review.

Because the order of expressing one's views in postargument conference is generally by seniority, I felt fairly secure in the knowledge that I would be the last to speak. After all, what would be left to either say or decide by the time it got to me? So I busied myself keeping score of the votes cast (per the request of the Chief Judge) and listened with great interest as my colleagues pontificated on the merits.

This worked fine for two of the three cases, but on the third I was suddenly faced with a seven-to-seven tie vote. So there I was, the Baby Judge, at my very first sitting, having to cast the deciding vote in a fairly significant case. The lesson I learned from this experience was two-fold: (1) no matter what the stage of one's judicial career, it is best to follow the Boy Scouts' motto of "be prepared," and (2) fate will occasionally scramble the best-laid plans, because shortly after our en banc hearing, the United States Supreme Court granted certiorari in a parallel case that allowed us to hold the en banc case in abeyance until the legal issue was resolved on high. (As it turned out, our eight-to-seven tentative resolution was *not* the way the Supreme Court eventually ruled.)

## V. THE REGULAR ROUTINE

Having survived my first sitting as part of the fifteen-member en banc court, I next faced the first of my regular sittings as a member of a three-judge panel. The Sixth Circuit panels sit one week at a stretch, eight times per year. Most of the judges arrive in Cincinnati on a Monday afternoon and leave on Friday afternoon four days later. During my first year on the court, we operated as if we had eighteen members. This was accomplished by having senior-status circuit judges, as well as district judges within the circuit, fill in as the third member of the various panels as needed. The three Sixth Circuit courtrooms in Cincinnati are thus utilized two weeks in succession eight times per year, with nine judges coming in one week and the other nine the next.

My first regular sitting was on January 29 and 30, 1998. Because it takes time to work a new member of the court into the sitting schedule, I had mostly two-day sittings in 1998, a couple of regular four-day sessions, and twice I sat for part of one week and all of the following week. I found that beginning with only a two-day sitting in January was a blessing, but that my week-and-a-half sessions were a compensating curse. Each day we schedule six cases for oral argument and dispose of four more on their briefs. This total of ten cases per day goes on for four days in succession (Tuesday through Friday) for each week of sittings. A week of forty

cases is enough to keep anyone happily challenged, but a week and a half with sixty cases begins to make one's head spin.

It was during my first regular sitting in January of 1998 that I became acquainted with the Sixth Circuit's panel-day system. The practice is for the circuit executive's office to assign each active judge a roughly equal number of "panel days" per calendar year. Originally the judge with panel-day responsibility simply prepared a short report of the panel's tentative decisions in cases designated for publication. These panel reports are promptly circulated to the other members of the court for the purpose of informing any other judge who might have a similar case under advisement of the pending decision. Over the years the responsibilities of the panel judge have grown to include the practice of writing the opinions for all of that day's six orally argued cases. Only if the panel judge is in dissent will the opinion be assigned to one of the other two panel members.

I quickly learned that one's work load is greatly affected by the number and spacing of the assigned panel days. There is also a work load price to pay in terms of disagreeing with the panel judge, because at one extreme it means writing a dissenting opinion and at the other extreme it means a fifty-fifty chance of being assigned to write the majority opinion if the third judge also adopts your contrary position.

In my first two-day regular sitting, I was the panel judge on my second day. Because I intended to dissent from the views of my two colleagues on two of the cases, and one case was ruled on from the bench, I ended up with only three majority opinions to write for that day's sitting. Of the twelve cases set for oral argument over the two days in question, seven were civil cases and five were criminal. They covered the waterfront in subject matter—age discrimination, bankruptcy, crack cocaine, habeas corpus, products liability, Social Security disability insurance, tax, etc.—the very variety that makes service on the federal bench so interesting. In addition to the regular three-judge panel sittings eight times per year, I learned that a Wednesday is reserved for en banc hearings each calendar quarter. Because relatively few cases are actually en banc, however, not all of these reserved days were needed. During my first year on the bench, we heard the three cases that I have already mentioned in December of 1997, none in March of 1998, two in June of 1998, and three in September of 1998. The fact that only eight cases were reheard en banc is attributable to the strict requirements set forth in Rule 35 of the Federal Rules of Appellate Procedure for granting such review, not from the lack of trying by the losing litigants. A total of 318 en banc petitions were filed during my first year, making the petitioners' rate of success only 2.5% (8 granted out of 318 requests).

After only a few months, I saw myself falling into a regular routine. I would come back to Memphis from a sitting in Cincinnati and try to write as many of my assigned opinions as possible in the next week or two. Then I would turn my attention to getting prepared for the next hearing a few weeks down the road. During

the four sitting days in Cincinnati, I would hear cases beginning at 9:00 a.m., confer with the other two judges on the panel immediately afterwards to make tentative decisions, have a late lunch with any of my fellow judges who were available, and spend the rest of the afternoon reviewing the cases set for the next day. After a break for supper with either my law clerks who came with me to Cincinnati or with a few of my colleagues, I was back to preparing for the next day's cases well into the evening. Four successive days of this routine is about all the fun and excitement one can stand at a stretch.

Although I found that keeping up with my assignments was a full-time proposition, my colleagues decided at our June 1998 en banc meeting that we were not processing enough cases. They were concerned that the average of fourteen months from notice of appeal to case decision in our circuit was at the tail end of the other circuit's disposition times. The cause of this lag was simply an imbalance between the number of appeals being filed and the available slots for oral argument. As a proposed short-term solution, the decision was made that we would each participate in thirty additional cases to be heard telephonically by the end of the year. The cases selected for these telephonic arguments were to be picked by the clerk's office with a view to finding simpler, one-issue appeals that could be handled more easily by telephone conference call.

With the three judges and the two counsel all at separate locations, the primary problem was trying not to have more than one person speaking at a time. Based on my experience with the first six cases that I heard telephonically on March 31, 1998, the procedure worked smoothly. The telephone operator was even able to take counsel temporarily off the line so that the three judges could confer privately at the end of each case. Although not an ideal procedure, telephonic arguments save counsel considerable travel time and expense and are preferable to denying oral argument altogether.

In my handling of all these various cases during my first year on the bench, I made 10 trips to Cincinnati and participated in 255 case decisions on the merits. Eighty-four of these cases were submitted on briefs and the decisions based on the recommendation of the Circuit's staff attorneys, with the lion's share of these cases being pro se prisoner appeals. The other 171 cases were heard on oral argument and decided without any assistance of the staff attorneys' office. I wrote 55 opinions, 9 of which were dissents and concurrences. Along the way I participated in numerous motion dispositions and reviewed the 318 en banc petitions with my law clerks. Finally, I attended a judges' orientation seminar in February of 1998, the Sixth Circuit Judicial Conference in May, a program at New York University's (NYU) School of Law for new appellate judges in July, and the Sixth Circuit judges' retreat in November.

## VI. LAW CLERKS

As should be obvious from the above numbers, there is no way that one judge can handle the work load without substantial assistance. That is why God created law clerks. Rather than constantly expand the number of judgeships, Congress in its wisdom has instead slowly increased the number of law clerks that each judge is allowed to hire. Long ago the ratio was one law clerk per judge. Now it is two law clerks for each district court judge and four law clerks for each circuit court judge.

Circuit judges actually have the choice of three law clerks and two secretaries, or four law clerks and one secretary. Because all law clerks now do their own word processing, however, and only old dinosaurs (like the author) still use a dictating machine, it was obvious to me that I wanted the four and one arrangement.

A new judge "coming online" must quickly locate law clerks who are immediately available. I found that the best sources are: (1) recent law school graduates just finishing up lower court clerkships who are looking for another year with an appellate court, and (2) associate attorneys at large law firms willing to grant their associates a one-year leave of absence in order to pursue a judicial clerkship. Of my four initial law clerks, three had recently finished lower court clerkships, and one of those plus my fourth clerk took leaves of absence from their respective law firms.

As for finding such law clerks, the Internet provides a great matchmaker service. Even before my Senate Judiciary Committee hearing on September 30, 1997, I started receiving resumes from enterprising young lawyers wanting the experience of a circuit clerkship. They had checked the United States Courts' Internet website to ascertain the nominees awaiting Senate confirmation. I started interviewing after I received a favorable vote by the Senate Judiciary Committee on October 9, 1997 and made my hiring offers as soon as I was confirmed by the full Senate on November 6, 1997. All four law clerks began on December 1, 1997, just nine days after my swearing-in.

During this clerk-seeking process, I learned that the typical starting date for law clerks was around Labor Day of each year, and that most law clerks were hired in March of their second year in law school. (Most law clerks are now hired in January and February.) So I quickly realized that: (1) I had to decide when the term of my initial clerks would end, and (2) I needed to already start looking for their successors. My first decision was relatively easy—I set the initial clerkships for a nine month term ending around Labor Day. This allowed me to be on schedule with the mainstream from then on.

As to locating my next group of law clerks, I had started receiving resumes soon after my nomination by President Clinton from a few third-year law students interested in a clerkship beginning in September of 1998. I then had a stroke of fortuitous timing. My thirty-year Harvard Law School reunion was coming up at the end of October 1997, a few weeks after my nomination had been approved by the

Senate Judiciary Committee. So I contacted the Harvard Career Services Office and set up nine interviews while I was there for the reunion weekend—eight with Harvard students and one with a Cornell student who traveled to Boston. From this group I hired three of my four law clerks for my second clerkship year. My fourth law clerk came from down the hall in the Memphis Federal Building, where she was then clerking for a federal district court judge.

I was thus able to start shortly after my swearing-in with both my immediate law clerks and their successors all lined up. This proved extremely important, because I was given the same case load as every other active judge from the very beginning. There is no such thing as a slow warm-up in the judging business, so the only alternative to not being immediately ready for action is to fall way behind—a very unpleasant prospect that would require a long recovery period down the road.

Another benefit of being up to date in the law clerk arena was that I could join the party (some would say *melee*) for the September 1999 clerkship year when the hiring season rolled around in March of 1998. The mad scramble for second year law students wanting clerkships a year and a half later is another story all unto itself. I offer just two comments here: (1) because each judge wants the best law clerks available, the race to interview and hire is intense, with a few of the judges engaging in “unsportsmanlike conduct,” and (2) I received approximately five times as many applications in February of 1999 as I did the year before, so a prospective applicant has much better odds of being interviewed by a new judge just coming online.

Once one’s law clerks are in place, the next issue is how best to use them. I assign every case I work on to a law clerk and they write full bench memoranda for the cases on my panel days. On my non panel days, they read the briefs and joint appendix and give me a one-page overview. We then meet individually to review and revise the bench memoranda, and to discuss the non panel cases once I have read the briefs and pertinent parts of the record myself. Our meetings as a group occur twice a week, where we discuss the *en banc* petitions that the law clerks have reviewed and go over the general status of memoranda, opinions, and other matters of interest to the chambers.

The law clerk assigned to a particular case also prepares the first draft of the opinion if it is mine to write, whether it be a majority opinion, a concurrence, or a dissent. We then meet individually to go through successive drafts until I am satisfied that the opinion is ready to circulate to my fellow panel members.

My law clerks also accompany me to the sittings in Cincinnati. Two fly up with me on Monday and fly back to Memphis on Wednesday afternoon. They keep notes on the oral arguments for the Tuesday and Wednesday cases (which are the ones they worked on in chambers), review the fifteen to twenty motions that are typically waiting to be decided later in the week by my three-judge panel, engage in further legal research as needed for the oral argument cases, and prepare the panel reports for any of my panel-day cases designated for publication. The other two law clerks arrive Wednesday afternoon to do the same things for the Thursday and Friday



sittings. We have periodic random drawings (using individualized ping-pong balls in a jury wheel) to decide which laws clerks come when and who gets first choice of case assignments.

All in all, the system seems to be working smoothly. We are keeping up with the case load and have a smaller opinion backlog than the majority of the active judges on the court.

## VII. WORKING WITH COLLEAGUES

In contrast to the virtually complete control that a judge has over his or her own chambers' staff, relations with one's colleagues are controlled only by the amorphous concept of "collegiality." We are far more equal than putatively equal partners in a law firm because each of us has lifetime job security that is in no way dependent on getting along with each other. But also unlike a law firm, we have no voice in choosing the "partners" with whom we wish to practice. Thus the need for collegiality is paramount in a smoothly functioning court of appeals. The concept requires far more than simply being courteous toward each other. We need to listen with an open mind, search actively for the best joint resolution of cases, be intellectually honest, respond promptly to circulating opinions, be well-prepared at our court sittings, and observe faithfully the court's procedural rules.

I am happy to report that a high degree of collegiality in fact exists on the Sixth Circuit Court of Appeals. All members of the court have been uniformly courteous and respectful. Some are slower than others in responding to circulating opinions, and some are more doctrinaire than others in dealing with particular economic and social agendas. But all are highly intelligent and conscientious individuals striving to reach what they see as a just result in each case before them. One cannot reasonably ask or expect anything more.

I have also found that tentative decisions reached in conference after oral argument can be fluid. Once the majority opinion is circulated, proposed dissents have sometimes disappeared. On at least two occasions, I have changed my mind as to the outcome of a case once I started drafting the majority opinion, with one or both of my colleagues then joining me in reaching a decision that is the opposite of what we had tentatively decided at our post argument conference. In the same vein, I recall one occasion when I was so persuaded by the proposed dissent in a case that I switched my vote to make the dissent the new majority opinion, no doubt to the chagrin of my third colleague.

Such changes after the panel has conferred, however, are relatively rare. The tentative decision reached following oral argument becomes the formal decision of the panel in probably ninety-five percent of the cases heard. Far more common is for the other two panel members to make written suggestions that are then incorporated into the majority opinion, even though the ultimate result is not changed.

With the current complement of fourteen active judges of the Sixth Circuit now evenly divided between Democratic appointees and Republican appointees, one might expect numerous dissenting opinions. In fact, such dissents are infrequent, despite the fact that the make-up of the three-judge panels is constantly reconstituted at random. There are virtually no dissents in the cases that are submitted on briefs and decided on the recommendation of the staff attorneys' office, and are found in less than seven percent of the cases decided on the regular oral argument calendar. (There were only 99 dissents out of 1,432 cases decided on the oral argument calendar during 1998.) On a personal level, I wrote only 9 dissents or separate concurring opinions out of the 255 case dispositions in which I participated during my first year on the bench.

I also found that dissenting from the reasoned opinion of a fellow panel member is not a decision to be made lightly. As one experienced appellate judge half-jokingly put it at the NYU program for new appellate judges, he dissents only when his sense of outrage overcomes his sense of inertia! Although I have not personally adopted this approach as a guiding principle, I have discovered that a dissent can draw pointed comments from the writer of the majority opinion. In response to one of my dissents arising from a criminal case heard during my first year on the bench, the majority opinion at various points referred to my views as erroneous, contradictory, a slight of Supreme Court precedent, simplistic, ill-conceived, a mischaracterization, and without basis in fact or logic! And this was from a colleague with whom I share a philosophical kinship and personally like. The lesson to be learned is to choose your dissents with care, develop a thick skin, make no assumptions about how any member of the court will decide a particular case, and move on to the next opinion.

Overall, I have found that working with my colleagues is a true pleasure. The general unanimity in case decisions is encouraging and the occasional dissents are simply the spice of life. Because so few of our decisions are in fact reviewed by the United States Supreme Court (in fiscal 1998, certiorari was granted in only 9 cases out of 2,105 appeals that were decided on their merits by our Circuit), the sense of responsibility that comes with the job makes it all the more rewarding. In effect, we are the court of last resort in 99.6% of the decisions rendered.

### VIII. FINAL THOUGHTS

As I reflect on the experiences from my first year on the bench, my most pleasant memories are of working with my chambers' staff and my colleagues, as well as the satisfaction of dealing with significant legal issues in which one hopes to make a positive contribution to the law of the land. When pressed to also evaluate the negative aspects of the job, my mind conjures up conveyor belts and chain gangs. I suppose that I should explain.

The conveyor belt is a metaphor for the constant work load of an intermediate

appellate court. Unlike the Supreme Court, we cannot pick and choose which cases to review. We must take on all comers. I picture in my mind an endless conveyor belt coming out of a deep pit in the clerk's office. On the conveyor belt are three sizes of hoppers. The largest hoppers contain forty cases each and are timed to dump their contents on my desk once every six weeks. In the medium-sized hoppers are the en banc cases set to unload four times per year. Finally, the smallest hoppers sprinkle down telephonic argument cases and en banc petitions at random times throughout the year. Because the belt never stops, one must quickly learn to process the load as it comes or run the risk of being buried alive from the buildup.

As for my image of a chain gang, the mental picture relates to my slightly envious perception that district court judges are more their own taskmasters. They can set their own schedules for hearing cases, make decisions when they choose, and need not consult with anyone before taking official action. At the court of appeals level, on the other hand, we are more like members of a judicial chain gang. To make any progress at all, we must consult with each other, coordinate our actions, and constantly exhibit the attributes of collegiality.

In the end, is it all worthwhile? Put another way, would I still leave the more lucrative but less certain world of private practice to join the judicial priesthood, knowing what I have learned during my rookie year on the federal bench? You bet I would! Just hitch up the chains, start the belt, and let me be part of the judicial machinery until I wear out.

